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Supreme Court, U.S.
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Case No. 00-1147

IN THE UNITED STATES SUPREME COURT

JERRY LAYNE ROGERS, SR.,
Petitioner,

v.

MICHAEL W. MOORE, Secretary,
Florida Department of Corrections, and
BRADLEY D. CARTER, Warden,
Union Correctional Institution,
Raiford, Florida,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. Whether the district court properly determined that a habeas corpus petition was untimely under 28 U.S.C. §2244, because the one year time period was not tolled by an untimely filed notice to invoke the jurisdiction of a court which lacked subject matter jurisdiction? (Restated)

II. Whether jurists of reason could debate that procedurally barred, untimely petitions for habeas corpus relief are not subject to review. (Restated)

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OPINIONS BELOW

The orders entered below by the court of appeals denying the motion for a certificate of appealability is unreported, but is provided in the Petitioner's Appendix at pages 3 through 4, hereinafter (A 3-4). The order of the district court denying the petition for writ of habeas corpus is also unreported. (A 7-14)

JURISDICTION

This Court has jurisdiction based on 28 U.S.C. §1254(1). This Court has jurisdiction to review the decision of the court of appeals denying the application for a certificate of appealability. Hohn v. United States, 524 U.S. 236, 118 S.Ct. 1969, 141 L.Ed.2d 242 (1998).

STATUTORY PROVISIONS INVOLVED

28 U.S.C. §2244(d)(1) & (2) provide:

> (D)(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a state court. The limitation period shall run from the latest of-
>
> (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;...
>
> (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.
>
> (2) The time period which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

Florida Rule of Criminal Procedure 3.850 provides in pertinent part:

> (b) Time Limitations....No other motion shall be filed or considered pursuant to this rule if filed more than 2 years after the judgment and sentence become final in a noncapital case...unless it alleges that
>
> (1) The facts on which the claim is predicated were unknown to the movant or the movant's

attorney and could not have been ascertained by the exercise of due diligence....

Florida Rule of Appellate Procedure 9.120(b), states:

Commencement. The jurisdiction of the supreme court described in rule 9.030(a)(2)(A) shall be invoked by filing 2 copies of a notice, accompanied by the filing fees prescribed by law, with the clerk of the district court of appeal within 30 days of rendition of the order to be reviewed.

STATEMENT OF THE CASE AND FACTS

On March 4, 1983, Jerry Layne Rogers was convicted of armed robbery after a jury trial in Orange County, Florida, and was sentenced to one hundred years of incarceration. The conviction and sentence were affirmed by the District Court of Appeal, Fifth District, and mandate issued on April 6, 1984.

Within the next two years, Petitioner filed two separate motions for post-conviction relief on March 20, 1985, and January 8, 1986. He also unsuccessfully sought appellate review of the denial of these motions.

On April 23, 1997, Petitioner filed the third motion for post-conviction relief which is at issue in this case. This pleading sought to excuse the procedural bar of untimeliness by alleging that there was newly discovered evidence.

Respondent specifically disputes the contention that the trial court's ruling on this third post-conviction motion was a ruling on the merits. Instead, the order clearly finds the motion to be successive and untimely. (A 17-27) The trial court noted that Petitioner "...had until April 6, 1986, to file a timely rule 3.850 motion regarding this case. He did, in fact, file two post-conviction motions during this period, and both were properly denied." (A 20)

The trial court's order then observed that Petitioner was claiming that his motion "is saved" by the "newly discovered evidence" exception. (A 20) This exception applies to evidence that could not have been discovered within the two year time period with the exercise of due diligence. Moreover, the court held that a defendant is still obligated under state law to file his 3.850 motion within two years of the actual discovery of the alleged newly discovered evidence. The trial court found that Petitioner's motion failed on both counts: the "new evidence" could have been discovered "by a mere public records request"

and so due diligence was not established; furthermore, the motion "is still time barred because he did not alert the Court to this new evidence within two years of actual discovery." (A 21)

After clearly and expressly enforcing this procedural bar, the trial court's order then turned to the claim that "fairness" entitled him to equitable relief. Petitioner selectively quotes a sentence from this section to support his claim that the ruling was on the merits, and even inserts a period in place of the second comma: "Still, even assuming all of what Defendant has alleged is true, neither of his arguments demonstrate that denial of his motion *as untimely* would be unfair because even if this Court finds Defendant's motion to be timely filed, the allegations contained therein would not suffice to satisfy the four prong test set out in Brady v. Maryland, 373 U.S. 83 (1963)." (Emphasis added) (A 17) Throughout the trial court's order, there are repeated and specific references to denial of the motion as untimely.

Alternatively rejecting the untimely claims, the order observed that the claimed newly discovered evidence was not "material", and furthermore, his argument had a "fundamental flaw" because the evidence was not exculpatory until some ten months after he was sentenced and his co-defendant confessed to the crime. (A 24) "At the time of discovery in Rogers's case, this evidence was not relevant to Rogers because McDermid had not yet confessed. In other words, absent McDermid's confession, there was no way for the State to know that the robberies they had investigated might bear, in any way, on Rogers's case." (A 25)

Respondent contends that this discussion of the fundamental flaws in Petitioner's argument was not a ruling on the merits of the claim. Rather, it constitutes a thorough rejection of the case after clearly enforcing a state procedural bar.

After the entry of this order, Petitioner sought appellate review in the District Court of Appeal, Fifth District. This court

entered its per curiam: affirmed decision on August 10. 1999. (A 15)

Respondent also specifically disputes the contention that "...from April 23, 1997, through October 4, 1999, Rogers had a 'properly filed' state post-conviction proceeding pending in state court." (Petition, p. 8) Respondents contend that state court proceedings concluded at the latest on September 10, 1999, when the time expired for filing a notice to invoke the jurisdiction of the Supreme Court, without any such notice being filed.

Florida Rule of Appellate Procedure 9.120 requires a notice to invoke the jurisdiction of the Supreme Court of Florida be filed within thirty (30) days of rendition of the order to be reviewed. Under Florida law, the notice must be filed, and not simply mailed, within the 30 day time limit. Raysor v. Raysor, 706 So.2d 400 (Fla. 1st DCA 1998); Allen v. Live Oak Lincoln Mercury, 647 So.2d 1060 (Fla. 1st DCA 1994). The rule extending the time for mailing does not apply to notices seeking further appellate review, because the court's order is rendered when it is filed, not when it is served. Turner v. State, 557 So.2d 939 (Fla. 5th DCA 1990); compare, Fla.R.App.P. 9.020(h) (rendition is filing) and 9.420(d) (additional time after service by mail).

Applying these well established rules of state court procedure, the notice to invoke the jurisdiction of the Supreme Court of Florida had to be filed with the clerk of the district court no later than Thursday, September 9, 1999. However, the notice to invoke was tendered to Federal Express on September 13, 1999, and due to conditions created by Hurricane Floyd, was not actually filed until Friday, September 17, 1999. The deadline expired several days prior to even tendering the document, regardless of subsequent events.

Therefore, the one day tolled by the filing of the April 23, 1997, motion for post-conviction relief expired on September 10,

1999, when the time expired to seek further review in state court. It is immaterial whether one or two days remained of the one year filing period, and immaterial whether the hurricane closed courts on September 14 and 15, 1999, because the notice was not served until after the time expired.

The Supreme Court of Florida entered an order on October 4, 1999, finding that the notice to invoke was "not timely filed", and further, that it lacked subject matter jurisdiction to review a per curiam: affirmed decision. (A 28)

The district court dismissed the petition for writ of habeas corpus as untimely when presented with this argument. The Court of Appeals, Eleventh Circuit, declined to issue a certificate of appealability.

REASONS FOR DENYING THE WRIT

I. THE DECISION OF THE DISTRICT COURT CORRECTLY DETERMINED THAT THE PETITION FOR WRIT OF HABEAS CORPUS WAS NOT TIMELY FILED AND THUS THE WRIT SHOULD BE DENIED.

A. THE ONE YEAR TIME LIMIT FOR FILING A PETITION FOR WRIT OF HABEAS CORPUS WAS NOT TOLLED BY A PROPERLY FILED APPLICATION FOR COLLATERAL REVIEW BECAUSE IT WAS UNTIMELY.

Respondent disputes the contention that the one year time limit for filing the petition for writ of habeas corpus in the district court was tolled by state court collateral proceedings. Petitioner did not, as he alleges, have pending a state application for collateral review prior to the time his habeas petition was filed.

On August 10, 1999, the district court of appeal entered its per curiam: affirmed order. Petitioner had thirty (30) days to file a notice to invoke the discretionary jurisdiction of the Supreme Court of Florida. Fla.R.App.P. 9.120(b). Therefore, his notice had to be filed no later than Thursday, September 9, 1999.

Petitioner appears to be under the erroneous assumption that he was entitled to an additional five days, for a total of 35 days, because the decision was mailed to him. This position is incorrect as a matter of state law.

An order is rendered when it is filed. Fla.R.App.P. 9.020(h). To invoke the jurisdiction of the Florida Supreme Court, a notice to invoke must be filed within 30 days of rendition of the order to be reviewed. Fla.R.App.P. 9.120(b). It is immaterial how that rendered order is served, whether by mail or by delivery. The thirty (30) day time limit is jurisdictional. See, Ervin v. Smith, 160 So.2d 518 (Fla. 1964).

Petitioner's reliance upon rule 9.420 is misplaced. That rule provides that if a party is permitted to do an act after *service* of a document, and that document is served by mail, 5 days are added to the time period. However, in this instance, Petitioner was permitted to do an act after the *filing* of a document, not its service. Therefore, his notice to invoke which was tendered on September 13, 1999, was untimely because the time for filing expired on September 9.

Since the motion for post-conviction relief was filed on April 23, 1997, Petitioner tolled the time for service of his habeas petition by only one day. In order to have timely filed his petition for writ of habeas corpus, he was required by 28 U.S.C. §2244, to file his petition in September, not October when it was actually filed.

The Supreme Court of Florida dismissed the case, stating that "it appear(ed) to the Court that the notice was not timely filed and further that it is without jurisdiction..." (A 21)

In Artuz v. Bennett, ___ U.S.___, 121 S.Ct. 361, 364 (2000), this Court interpreted the phrase "properly filed" as a pleading that is "...in compliance with the applicable laws and rules governing filings. These usually prescribe, for example,...the time limits upon its delivery..." This Court acknowledged that documents that were not filed in compliance with the rules pertaining to the time limits for filing were not properly filed.

The district court's order finding that Petitioner's habeas corpus petition was not timely was correct.

B. THE ONE YEAR TIME LIMIT FOR FILING A PETITION FOR WRIT OF HABEAS CORPUS WAS NOT TOLLED BY A PROPERLY FILED APPLICATION FOR COLLATERAL REVIEW BECAUSE THE FLORIDA SUPREME COURT LACKED SUBJECT MATTER JURISDICTION.

An equally compelling basis to find that the proceeding in the Supreme Court of Florida did not toll the one year time limit is because that court lacks subject matter jurisdiction to review per curiam: affirmed (PCA) decisions. The order dismissing the case found the notice untimely, and also, "that it is without jurisdiction under Article V of the Florida Constitution..." citing Jenkins v. State, 385 So.2d 1356 (Fla. 1980).

The Supreme Court of Florida has consistently and repeatedly held that it lacks subject matter jurisdiction to review PCA decisions. Jenkins v. State, supra; Florida Star v. B.J.F., 530 So.2d 286, 288, n. 3 (Fla. 1988). A notice to invoke review of a PCA decision does not toll the two year time for filing state motions for collateral relief because the court lacks subject matter jurisdiction. Beaty v. State, 701 So.2d 856 (Fla. 1997).

In Artuz v. Bennett, ___ U.S.___, 121 S.Ct. 361, 364 (2000), this Court determined that documents erroneously accepted by a court which lacks subject matter jurisdiction are only "...*pending*, but not *properly filed*." (emphasis in original) The entire application, and not simply individual claims, are barred by the lack of subject matter jurisdiction. Id. Therefore, after the PCA decision issued August 10, 1999, there was no court in Florida with subject matter jurisdiction to consider Petitioner's case. The federal habeas petition was not filed until October 1, 1999, and so it was properly determined to be untimely.

II. THE ELEVENTH CIRCUIT'S DENIAL OF A CERTIFICATE OF APPEALABILITY WAS PROPER BECAUSE NO JURIST OF REASON COULD DEBATE THAT AN UNTIMELY PETITION PRESENTING PROCEDURALLY BARRED CLAIMS STATES A VALID CLAIM OF THE DENIAL OF A CONSTITUTIONAL RIGHT.

The district court's dismissal of the petition for writ of habeas corpus as untimely was proper. Respondent also disputes the contention that the trial court's denial of relief was a ruling on

the merits. Petitioner writes: "The Florida court stated in its written opinion that it 'assum[ed] all of what [Rogers] has alleged is true.' (App. A 17) The state court...proceeded to address and reject Rogers's *Brady* claim on the merits." (Petition p. 16) The entire sentence in the order selectively quoted clearly finds the motion untimely, and alternatively, without merit: "Still, even assuming all of what Defendant has alleged is true, neither of his arguments demonstrate that denial of his motion *as untimely* would be unfair because even if this Court finds Defendant's motion to be timely filed, the allegations contained therein would not suffice to satisfy the four prong test set out in Brady v. Maryland, 373 U.S. 83 (1963)." (Emphasis added) (A 17)

The order denying relief repeatedly stated that the third motion for post-conviction relief was untimely. "...Defendant is still time barred..." (A 15) "Presentation of this 'new' evidence is, therefore, several years late." (A 16) "...(N)either of his arguments demonstrate that denial of his motion as untimely would be unfair..." (A 17)

In Harris v. Reed, 489 U.S. 255, 109 S.Ct. 1038, 103 L.Ed.2d 308 (1989), this Court held that a state court judgment that clearly and expressly rests on a state court procedural default is barred from federal habeas review, unless the petitioner can show cause for the default and actual prejudice. Petitioner here incorrectly asserts that his claim was not procedurally barred in state court, but rather, was a decision on the merits. He does not allege either cause or prejudice to excuse the procedural default. Therefore, this claim, if it were reviewed in federal court, must be determined to be procedurally barred.

In the order denying the motion for a certificate of appealability, the Eleventh Circuit correctly cited to Slack v. McDaniel, ___U.S.___, 120 S.Ct. 1595 (2000). To merit a certificate of appealability under Slack, the Petitioner must demonstrate that jurists of reason would find it debatable that the district court erred in finding the petition procedurally barred, and

also, that the petition states a valid claim of the denial of a constitutional right. In this case, neither of these showings is met because the district court correctly concluded that the petition was untimely, and also, the state court expressly found that the third motion for post-conviction relief was procedurally barred. Neither prong of the Slack standard is met.

This case is not one which warrants review on the merits by this Court because it presents no issues of exceptional importance. The claims raised were found to be untimely and procedurally barred. This Court should decline to issue the writ of certiorari.

CONCLUSION

Based upon the foregoing argument and authority, Respondent respectfully requests this Honorable Court to deny the petition for writ of certiorari.

Respectfully submitted,

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